

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 1999-033-C - ORDER NO. 1999-455
JUNE 25, 1999

IN RE: ITC^DeltaCom Communications, Inc.,)	ORDER DENYING
)	MOTIONS AND
Complainant/Petitioner,)	SETTING MATTER FOR
)	HEARING
vs.)	
)	
BellSouth Telecommunications, Inc.,)	
)	
Defendant/Respondent.)	
)	
)	

This matter comes before the Public Service Commission of South Carolina (the Commission) on two Motions filed by the two parties to this Complaint matter, ITC^DeltaCom Communications, Inc. (DeltaCom) the Complainant, and BellSouth Telecommunications, Inc. (BellSouth), the Respondent. The original complaint filed by DeltaCom alleges a breach of the terms of the two parties' interconnection Agreement. The ultimate issue to be decided by us is whether local, seven-digit calls placed by BellSouth customers to an Information Services Provider (ISP) customer of DeltaCom constitute local traffic for which reciprocal compensation is due under the parties' interconnection Agreement. Both parties have filed Motions that, if granted, would summarily dispose of this issue. After hearing oral arguments, and considering the Motions and the record in this case, it is our opinion that both of these Motions must be

denied, and that the matter should be set for hearing, so that we may hear the evidence and decide the issue based thereon. Our reasoning is delineated in the following paragraphs.

DeltaCom filed a Motion for Summary Disposition of this matter on the ground that, as a matter of law, BellSouth is collaterally estopped by the decisions of other state commissions from relitigating the issue of reciprocal compensation for calls placed by customers of BellSouth to ISPs served by a competitive local exchange carrier (CLEC) such as DeltaCom.

DeltaCom alleges in support of its Motion that, at the time it filed its complaint, twenty-six state commissions had held that ISP traffic is subject to reciprocal compensation and no state commission had concluded otherwise. Since the filing of the Complaint, DeltaCom notes that three more state commissions have agreed with the first twenty-six, bringing to twenty-nine the total number of states who have held that ISP traffic is subject to reciprocal compensation. Further, although the Federal Communications Commission (FCC) has issued an Order considering this matter, DeltaCom argues that the decision specifically states that the FCC will not interfere with any state commission decision, previously made or to be made in the future, requiring payment of reciprocal compensation for ISP traffic, at least until the FCC promulgates a rule on this point. It appears that state commissions have the authority to decide this matter under sections 251 and 252 of the Telecommunications Act of 1996.

In further support of its Motion, DeltaCom states that five of the states deciding that reciprocal compensation applies to ISP traffic involved proceedings to which

BellSouth was a party, and that one decision involved the same Agreement between BellSouth and DeltaCom that is at issue in this proceeding. Therefore, DeltaCom argues that BellSouth is collaterally estopped by prior state commission decisions rendered against it from relitigating the issue of reciprocal compensation for ISP traffic.

In reply, BellSouth denies that ISP traffic is local, and therefore, denies that it has breached the parties' interconnection Agreement, and BellSouth specifically denies that it owes DeltaCom payment for reciprocal compensation for ISP traffic under the Agreement. BellSouth moves to dismiss DeltaCom's complaint, and quotes the FCC's Order, which holds that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." BellSouth goes on to state that the FCC Order holds that ISP-bound traffic does not terminate at the ISP's local server, but continues to the ultimate destination or destinations, specifically at a Internet website that is often located in another State. Since Internet bound traffic is not local, according to BellSouth, it does not owe DeltaCom reciprocal compensation, and the Complaint should be dismissed.

With regard to DeltaCom's Motion for Summary Disposition, BellSouth argues that the Motion should be denied, since it has not been a party of record of any final, non-appealable order regarding the payment of reciprocal compensation for ISP bound traffic. Further, BellSouth argues that the decisions cited by DeltaCom are not binding on this Commission because the decisions involve individual Agreements approved separately by other Commissions or regulatory bodies.

BellSouth also argues that our Supreme Court has stated that offensive collateral estoppel may be asserted in only limited circumstances. According to the case of S.C.

Property & Cas. Ins. v. Wal-Mart, 403 S.E. 2d 625, 627 (S.C. 1991) “Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action....{W}hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Deltacom cites other commission decisions in support of its Motion, which is based on collateral estoppel. BellSouth alleges that none of these decisions is a final and non-appealable order, therefore collateral estoppel does not apply, and DeltaCom’s Motion should be denied.

In reply to BellSouth’s Motion and accompanying arguments, DeltaCom contends that ISP traffic is local traffic, and states that the real question is whether, when the parties entered into the Agreement, they intended that ISP traffic constituted local traffic for which reciprocal compensation must be paid. DeltaCom reiterates that five state commissions have determined that the parties to a number of BST interconnection Agreements, including the very Agreement at issue in this proceeding, did intend that local traffic include ISP traffic for purposes of reciprocal compensation. Further, although declaring that ISP traffic is largely interstate, the FCC, according to DeltaCom, unequivocally recognized that the decisions of state commissions, whether issued before or after the FCC ruling, would be given binding effect until such time as the FCC issues a prospective rule governing reciprocal compensation for such traffic. DeltaCom also argues that South Carolina law does not require that an Order or judgment be “non-

appealable” for collateral estoppel to arise, and that a judgment remains final for collateral estoppel purposes even while under appeal.

The Commission Staff argues that we should deny both Motions. First, Staff notes that summary disposition of a matter is improper when there are material issues of fact to be determined in a case. We would note that summary judgment in the courts is only appropriate when there are no issues of material fact and a party is entitled to judgment as a matter of law. “Summary judgment can be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” See Trico Surveying, Inc. v. Godley Auction Co., Inc., ___ S.C. ___, 431 S.E. 2d 565 (1993). Staff believes that there are material issues in this case to be determined. We agree with the Staff. Though there are certainly subsidiary issues, we must first determine the intent of the parties when they entered into their interconnection Agreement, with regard to reciprocal compensation for the completion of ISP calls. Second, we must also determine whether ISP calls are local calls for purposes of reciprocal compensation. Though various States have made their determination on these matters in the context of their own special state-specific circumstances, this Commission has not had that opportunity. Since there are certainly material issues of fact in this case to be decided, summary disposition is inappropriate, just as it would be if this matter was before a Court.

We take no position at this time on whether the decisions relied on by DeltaCom are “final” decisions by which collateral estoppel may be applied. In this case we simply decline to apply the principle of collateral estoppel, on the grounds that we would prefer to make our own specific determination of the various questions in this case after a full-

blown hearing on this particular interconnection Agreement, and after hearing the South Carolina circumstances in this case. As the General Counsel noted at oral argument, South Carolina is a unique State with unique circumstances, and we believe that it is the better practice to hear all the South Carolina circumstances connected with this case before we issue a decision on the merits. DeltaCom's Motion is denied.

Likewise, BellSouth's Motion is denied. As DeltaCom has pointed out, the FCC order relied on by BellSouth discusses ISP traffic as interstate in nature, but also notes that it has promulgated no specific rules or regulations with regard to this reciprocal compensation issue. The Order further defers to the state commissions on this issue until such time as it issues rules on the subject. Accordingly, we believe that, until the FCC does so, we still have the discretion to make our own determination as to how to handle reciprocal compensation for ISP calls, and to make a determination as to the intent of the parties with regard to this issue in the context of the specific interconnection Agreement involved.

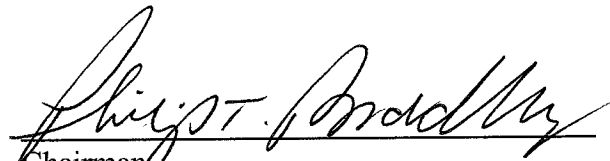
Accordingly, Staff shall set this matter for an evidentiary hearing, and shall set such prefile dates as may be appropriate.

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This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)